Supreme Court of the United States.

OCTOBER TERM, A. D. 1900

No. 35.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

Brief for Defendant in Error in Answer to Application of the Yazoo and Mississippi Valley Railroad Company for a Modification of the Judgment of Affirmance, Rendered on January 7, 1901.

This application seems to be made on the theory that the opinion and judgment of this court were rendered through mistake and unadvisedly as to the taxes of 1892, and on the claim that the consolidation of October 24, 1892, could not

affect the taxes of 1892; but such is not the case. In our original brief, filed on we called particular attention to this matter. Our contention is that the effect of the consolidation of October 24, 1892, was exactly the same as if a valid law had been passed on that date repealing the exemption. This brief is numbered as No. — of the October term.

In their amended brief on the merits, filed on April —, 1900, and entitled as of the October term, 1899, on page 6 the plaintiffs in error speak of the taxes of the *preceding* year being applied to the construction debts. In order that this court might not be misled by this inaccuracy, we, in our "Brief of F. A. Critz and R. C. Beckett, in reply to brief of opposite counsel on the merits," entitled No. 244, October term, 1899, under subdivision "3rd," on page 2, call the attention of this court particularly to the fact that in section 5 (2) of their charter, under which the exemption is claimed, the appropriation was not to be made in the preceding year, but "during the year" in which the exemption was claimed, and that the taxes under the Mississippi law in force at the time were not delinquent till December 15, 1892, and referred to sections 3379 and 3801 of the Code of 1892.

It is scarcely necessary to add anything to what has already been said, and we call the attention of this court to it in order to show that while opposite counsel only referred to it incidentally, yet they did not overlook it, and that, anticipating some question of this kind in the minds of the court, we met it openly and squarely, and that it was not a matter in which the court was misled or which they overlooked. Under section 3379 of the Code of 1892, which has reference to privilege taxes *eo nomine*, it is provided "the railroad commission

shall annually, on or before the first Monday in August, classify the several railroads according to the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December." Now, if the court will look at our declaration for the taxes of 1892, it will see that out of abundant caution we sued for both the privilege taxes due December 1, 1891, and those due December 1, 1892.

Record, pp. 6–10.

On instructions to the jury on behalf of these plaintiffs in error the court ruled that we were not entitled to recover for taxes due December 1, 1891. In fact, there were no privilege taxes due till December 1, 1892, as they were first levied under the Code of 1892.

Record, p. 12.

We raised no question as to this, and on the second trial, on July 8, 1898, we only took judgment for the privilege taxes due December 1, 1892. It must here be borne in mind that privilege taxes are never levied on a business or occupation already ended. That would clearly be depriving a man of his property without due process of law. On the contrary, from the very nature of such taxes, they are prescribed for the privilege of carrying on a certain business or occupation *for the future*. Hence the privilege taxes due on December 1, 1892, were for the privilege of conducting the business of a railroad for the year December 1, 1892, to December 1, 1893, all of which was clearly after the consolidation on October 24, 1892.

Record, pp. 630, 631.

Now, as to the ad valorem taxes. As quoted by opposite counsel in this pending application, the concluding part of

section 3801 of the Code of 1892 is that "and it shall be the duty of every person assessed to pay his taxes to the collector on or before the fifteenth day of December." And section 3802 provides that "all taxes remaining unpaid on the fifteenth day of December shall immediately be collected by the collector by distress and sale of any personal property liable therefor," etc.

From this it is plain that there was no obligation on the part of the plaintiffs in error to pay the taxes *before the 15th day of December*, 1892, and the point we made in the previous briefs, and make now, is that the effect of the consolidation on October 24, 1892, is exactly the same as if a valid law had been passed on that date repealing the exemption and prohibiting the sheriffs and tax collectors from *thereafter* receiving the affidavits in lieu of money for the taxes.

In the pleas first filed there is no allegation whatever that the taxes had been paid on construction debts, and affidavits made and tendered *before October* 24, 1892.

Record, p. 55.

The affidavits and receipts themselves are omitted from the record as immaterial, and if they had in fact been made and tendered before the consolidation, and this was a good defense to the suit, they were very material and should not have been omitted from the record.

This court is not authorized to reverse cases on uncertainties. And when such affidavits and receipts were, as a matter of fact, not tendered or delivered before the consolidation, and for that reason are omitted from the record as immaterial, it is asking most too much of this court to request it to consider these things as done which were not done, and

to presume that those things are material which all parties have agreed are not material.

Record, p. 696.

All the original pleas are withdrawn, and hence could not be looked to, even if they had shown that the affidavits were tendered and receipts given before the consolidation, and the pleas attempted to be filed in July, 1898, could not be looked to because they were stricken out, and this court has decided in its opinion that they were attempted to be filed too late; but, even if they had been filed in time, they do not show that the affidavits were tendered or receipts given *before October* 24, 1892.

Record, pp. 55 and 568, 569.

So far as the assessment for 1892 being made before the consolidation, it must be borne in mind that these suits are all for current taxes on assessments already made under sections 3875 to 3884 of the Code of 1892, and not on assessments for *back taxes* to supply omitted assessments under the delinquent revenue agent law of February 7, 1894 (Laws 1894, pp. 29–31), and the contention of the plaintiffs in error has always been that in such cases an assessment was necessary to fix the liability and amount of taxes which under their charter they were required to pay on construction debts; and also in their plea in No. 355 they expressly state and claim that they have never objected to an assessment on the property for this reason.

See Record in No. 355, pp. 195, 196.

We would also call particular attention to the suggestion of errors in the State supreme court on the first appeal (Record, p. 518), and to the assignment of errors on the second appeal (Record, p. 683), to show that this point was not made, either in the circuit court or State supreme court, and it is too late to make it here now. Indeed, it was not made in the assignment of errors in this court (Record, p. 700), and was only made incidentally, as we have above shown, in a brief of opposite counsel, and under the rules of this court, not having been made and assigned for error, the plaintiffs in error are not in position to make it now.

As also shown above, we did ourselves call the attention of the court to it, and no doubt it was considered by the court.

It is not proper that a point like this should be held back and attempted to be sprung on the court after its decision.

So we think the opinion and judgment of this court rendered on January 7, 1901, was not ill-advised or rendered by oversight or on a mistake of the facts, and that this application should be overruled.

This court has decided that it will not go into or decide constitutional questions unless necessary to dispose of the case.

Baker *vs.* Grice, 169 U. S., 292.
Adams *vs.* Bank, 74 Miss., 316.

If, however, the court thinks it necessary to admit error and go into the constitutional phases of the case, we call attention to the opinion of the supreme court of Mississippi in the record, on pages 651 to 673, and 77 Miss., pages 270 to 293, and the briefs of all the counsel for the defendant in

error in the case, and also especially in cases Nos. 77, 78, and 79, October term, 1900.

In regard to the fiscal year referred to by opposite counsel, that refers to settlements and acts of the State officers in the fiscal affairs of the State and never has had any application to county affairs or to taxes.

Respectfully submitted.

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